STATE OF MICHIGAN

COURT OF APPEALS

BESTWAY RECYCLING, INC., and AARO DISPOSAL, INC.,

Plaintiffs-Appellants,

v

LAWRENCE BEAN, AL HOWARD, and JAMES SYGO,

Defendants-Appellees.

UNPUBLISHED
May 20, 2003

No. 239440
Wayne Circuit Court
LC No. 00-012704-NZ

Before: Sawyer, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). The trial court's decision to grant defendants' motion for summary disposition was predicated on a finding that plaintiffs, no later than 1994, discovered, or should have discovered through the exercise of reasonable diligence, the existence of an injury and the causal connection between the injury and defendants' breach of duty. Therefore, the applicable three-year statute of limitations barred plaintiffs' cause of action for gross negligence that was filed in April 2000. We affirm.

Plaintiffs' cause of action for gross negligence arises out of an earlier action by the State of Michigan and its relevant agencies against plaintiffs and other persons and entities associated with a sanitary landfill in Waterford Township (landfill litigation).[1] The state initially issued a cease and desist order stopping operation of the landfill before filing suit. The basis for the state's action was a claim that hazardous waste was being dumped at the landfill which was creating a threat to the environment and to the health of the surrounding communities. The state asserted, in part, that the dumping of hazardous waste was affecting the toxicity level of the local groundwater. After approximately six years of litigation, the state stipulated to the dismissal of the lawsuit against plaintiffs in June 1997 after trial had commenced. Plaintiffs asserted in the present action that the individual defendants, state employees, were grossly negligent with respect to groundwater testing undertaken in 1990, which formed the basis of the state's action against plaintiffs, and which was allegedly conducted in a fraudulent manner. Plaintiffs

[1] The state first sued Oakland Disposal, Inc. (Oakland) in 1991 as part of the landfill litigation.

maintained that defendants' gross negligence resulted in extensive economic injury to their respective businesses.

On appeal, plaintiffs argue that they did not discover their cause of action until June 1997, which was less than three years before filing suit in April 2000. According to plaintiffs, they first discovered in June 1997 that monitoring well number nineteen (well #19) was tested in a fraudulent manner based on defendant Bean's field notes presented at trial in 1997. Plaintiffs also argue that, regardless, they could not initiate a suit for gross negligence until completion of the state's lawsuit. Plaintiffs' arguments lack merit.

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46-47; 631 NW2d 59 (2001). In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001). Where there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, the decision regarding whether a plaintiff's claim is barred by the statute of limitations is a question of law that this Court reviews de novo. *Id.*[2]

The period of limitations is three years for an action alleging gross negligence. See MCL 600.5805(9). In general, "the period of limitations runs from the time the claim accrues." MCL 600.5827. The claim "accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." *Id.* Our Supreme Court in *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995), stated that the term "wrong," as used in MCL 600.5827, refers to the date on which the plaintiff was harmed by the negligent act, not the date on which the defendant acted negligently. "Otherwise, a plaintiff's cause of action could be barred before the injury took place." *Id.* at 535.

The discovery rule has been applied in situations where an element of a cause of action has occurred, but cannot be pleaded in a proper complaint because it is not yet discoverable through reasonable diligence. *Travelers Ins Co v Guardian Alarm Co of Michigan*, 231 Mich App 473, 479-480; 586 NW2d 760 (1998).

Utilizing the discovery rule, a claim accrues when, on the basis of objective facts, a plaintiff should have known or been aware of a possible cause of action. *Solowy v Oakwood*

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[2] The trial court's ruling was also premised on MCR 2.116(C)(10), which provides for summary disposition where there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. Our Supreme Court has ruled that a trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

Hosp Corp, 454 Mich 214, 222; 561 NW2d 843 (1997); *Moll v Abbott Laboratories*, 444 Mich 1, 23-25; 506 NW2d 816 (1993). A plaintiff is aware of a cause of action when he or she is aware of an injury and its possible cause. *Moll, supra* at 24. A plaintiff need not know the specifics of the evidence for a cause of action to accrue, it is sufficient that he or she knows a cause of action exists in their favor. *Id.* The discovery rule serves to avoid extinguishing a claim before the injured party is even aware of a possible cause of action and is to be applied in appropriate instances and only where there is objective and verifiable evidence so that there may be some indicia of assurance of reliable fact finding. *Boyle v General Motors Corp*, 250 Mich App 499, 502-503; 655 NW2d 233 (2002).

The discovery rule has been extended, in part, to cases involving medical malpractice, negligent misrepresentation, and products liability actions. *Stephens, supra* at 537. The *Stephens* Court, referencing these causes of actions and declining to apply the discovery rule in an automobile tort liability case, stated:

> Defendant correctly points out that in these contexts, evidentiary records are rarely diminished by the passage of time. Hence, as we stated in *Larson* [*v Johns-Manville Sales Corp*, 427 Mich 301, 312; 399 NW2d 1 (1986)], quoting *Eagle-Pitcher Industries, Inc v Cox*, 481 So 2d 517, 523 (Fla App, 1985), "the concern for protecting defendants from 'time-flawed evidence, fading memories, lost documents, etc.' is less significant in these cases." That is not the case in automobile tort liability cases, where the evidence for liability defense is often dependent on fading memories of individual witnesses.
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> We hold that the discovery rule is not available in a case of ordinary negligence where a plaintiff merely misjudges the severity of a known injury. [*Stephens, supra* at 537.]

It is thus apparent that the discovery rule does not necessarily apply in every court action as plaintiffs appear to imply. We find it unnecessary to determine whether the discovery rule should be extended in the case at bar where gross negligence is alleged arising out of the testing of contaminants at a waste facility; plaintiffs' arguments fail even if we take into consideration the discovery rule.

Plaintiffs concede that they were aware of an injury in 1992 when assets were sold at a substantially reduced value caused by the state's actions regarding the landfill. The dispute focuses on when plaintiffs became aware, or should have become aware, of the cause of the injury, which, alleged here, is the gross negligence of defendants.

Plaintiffs argue that the highest alleged contamination was evidenced by the testing of well #19 on September 28, 1990. Plaintiffs maintain that defendant Bean's field notes indicate that well #19 could not be purged, or in other words, as explained by plaintiffs' expert, cleared of stagnant water. Plaintiffs assert that it is imperative that a well be properly purged and maintained to obtain accurate results regarding contaminants. Plaintiffs allege that Bean could not obtain test results from well #19 on September 7, 1990, because of problems with the well, and his actions in obtaining results on September 28th indicated that he failed to obtain test results pursuant to established procedures.

Plaintiffs were drawn into the landfill litigation in 1992, and Oakland was involved in litigation associated with alleged landfill contamination commencing in 1990 and 1991. Documentary evidence and deposition testimony reflects that owners of Oakland also owned, in part, Bestway and Aaro. Attorney David Black, plaintiffs' trial and appellate counsel in the case at bar, appears on court documents as counsel for Oakland as early as 1992, and there exists court documents showing Black acting as counsel for Bestway and Aaro in 1993. By at least 1994, court documents indicate that Black represented Oakland, Bestway, and Aaro. Documents further indicate that plaintiffs formally adopted Oakland's position in the landfill litigation. Considering this evidence and other documents presented to the trial court, the strong interrelationship between Oakland, Bestway, and Aaro is indisputable, and we conclude that any information gained by Oakland early on in the landfill litigation was also necessarily known by plaintiffs.

Oakland's 1990 complaint against the state seeking to invalidate the cease and desist order alleged that private lab tests indicated "no substantial basis of contamination." Findings in 1992 by a special master appointed in the landfill litigation indicated that unconfirmed and divergent analytical laboratory results mandated further review of existing results. Affirmative defenses asserted by Bestway and Aaro in the landfill litigation, included, in part, a claim that the state should be estopped from asserting continuing environmental violations because of the state's unlawful actions in closing the landfill. Plaintiffs also asserted that the state had unclean hands for illegally closing the landfill, and that the state was comparatively negligent for breaching environmental laws. Throughout the years of the landfill litigation, including the early 1990s, plaintiffs continually and intensely challenged contamination findings by the state, and they asserted that the state's action was illegal and motivated by political pressure.

In a July 1991 deposition of defendant Bean in the landfill litigation, he testified:

> We sampled quite a few wells before 19. We tried to do 19 but the well needed to be redeveloped. It was silty. They worked on the well. And we went back on the 28th, and we collected the sample on the 28th, on well number 19.

Bean was questioned extensively concerning the state's September 28th testing of well # 19, the high level of contaminants found as a result of the testing, and the contradictory test results obtained by Oakland. Bean was also so questioned in 1991 and 1992 in proceedings before the special master, which thoroughly addressed his testing of monitoring wells, including well #19.

Additionally, the October 1990 cease and desist order issued by the state and sent to Oakland provided, in part:

> On September 28, 1990, Department staff sampled monitoring well [19] located along the east side of the Disposal Area approximately 300 feet north of the southeast corner of Cells 1-6. (This well could not be sampled during the September 4-10 sampling).

In light of this documentary evidence, it is evident that plaintiffs had information indicating an unusually high level of contaminants with respect to well #19, contradictory test results, and problems and defects with well #19 that did not permit sampling approximately two

weeks earlier. With respect to the high levels of contaminants found in well #19, as indicated in the September 28th sampling, plaintiffs' own expert stated in his affidavit:

> In analyzing the results from this particular sampling, I found that certain parameters, particularly specific conductance, a measure of inorganic solids, exceeded those of the leachate itself. This strongly suggests to me that this particular sample from well No. 19 was not valid. The results of this sampling were so high in comparison to the results from the other samplings as reported in Paragraphs 6 and 7 of the Cease and Desist letter that, in my opinion, *any reasonable person familiar with these types of issues knew or should have known that the results were likely flawed and cannot reasonably be used as the basis for an enforcement action.* [Emphasis added.]

Therefore, by 1992, plaintiffs had sufficient information, and in fact no less information than that relied on in filing the instant action as reflected by the allegations contained in the complaint, giving rise to a possible cause of action against defendants.[3] Plaintiffs knew or should have known at that time that a cause of action might be pursuable. Accordingly, the three-year statute of limitations elapsed well before the filing of the April 2000 complaint.

Plaintiffs additionally argue that they had to wait until the landfill litigation was completed until filing suit because a favorable resolution was necessary as a required element for their cause of action. We disagree.

MCL 600.5827 has been interpreted to mean that a claim does not accrue until all the necessary elements of a cause of action have occurred and can be alleged in a proper complaint.

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[3] In plaintiffs' appellate brief, they merely cite to their complaint asserting that on September 7, 1990, Bean attempted to conduct a test on well #19 and could not get results because of problems and defects with the well, and that he subsequently returned to conduct a test on September 28th in a manner that failed to comply with established procedures. This test, according to plaintiffs, yielded fraudulent results. Plaintiffs vaguely argue that until they received the field notes in June 1997, they did not have actual or constructive knowledge of misconduct, and Bean's deposition failed to convey the absence of any factual basis for the test results. This is the full extent of plaintiffs' argument, and it mimics their argument made below to the trial court. Bean's field notes reference, in part, the words "purged dry" and "no recovery" and "silt sand – well needs development." We are unable to decipher from the field notes the meaning of these words in relation to the remaining language, symbols, numbers, and scientific jargon contained in the notes. Plaintiffs fail to explain in any meaningful manner how the words and information contained in the field notes indicate fraud and something previously unknown to them, nor do they explain the information found in the notes in any other context. Plaintiffs do not even directly cite to the field notes in their brief. At best, it would appear that the field notes show problems with a well; however, problems specifically regarding well #19 were made known years earlier as discussed above. If there is additional relevance to the field notes, we are unable to determine such relevance, and plaintiffs do not elucidate. It is insufficient for an appellant to simply announce a position and leave it to this Court to unravel and elaborate for him his arguments. *Mudge v Macomb Co,* 458 Mich 87, 105; 580 NW2d 845 (1998). We note that especially in a case involving scientific testing and terminology, minimal elaboration is required in order to allow us to issue a sound reasoned opinion.

Connelly v Paul Ruddy's Equipment Repair & Service Co, 388 Mich 146, 150; 200 NW2d 70 (1972). Plaintiffs sued solely on a claim of gross negligence. Governmental employees are immune from liability for injuries they cause during the course of their employment if the conduct does not amount to gross negligence which is the proximate cause of the injury or damage. MCL 691.1407(2). The statute defines gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). Gross negligence is the proximate cause of an injury where it is the one most immediate, efficient, and direct cause of the injury or damage. *Robinson v Detroit,* 462 Mich 439, 462; 613 NW2d 307 (2000). To establish a prima facie case of negligence, a plaintiff must prove: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Schultz v Consumers Power Co,* 443 Mich 445, 449; 506 NW2d 175 (1993).

Here, without addressing the weight and validity of the claim and the essential elements, all of the elements of a prima facie case for gross negligence would appear to have existed in 1992. Generally speaking, there is no requirement that an underlying action be terminated in a party's favor before an action for gross negligence can be pursued. Plaintiffs could have filed a complaint or third-party complaint against the individual defendants during the landfill litigation. Moreover, if in fact there was gross negligence, plaintiffs suffered a resulting injury before being added as parties in the landfill litigation because of their inability to continue hauling waste to Oakland. Even before the landfill litigation commenced, the damaging test results and cease and desist order harmed plaintiffs. One can even argue that had the landfill litigation resulted in a judgment favorable to the state, plaintiffs could have pursued a gross negligence action against defendants on the basis that had defendants not been grossly negligent, no judgment would have been entered against plaintiffs in the landfill litigation.[4] The bottom line is that plaintiffs' cause of action is and would not be controlled by the termination of the landfill litigation and whether the litigation terminated in plaintiffs' favor. Plaintiffs did not have to wait.

We do not disagree with plaintiffs' argument that a malicious prosecution action requires that an underlying prosecution, civil or criminal, be terminated in the plaintiff's favor. *Matthews v Blue Cross & Blue Shield of Michigan,* 456 Mich 365, 382-383, n 23; 572 NW2d 603 (1998); *Peisner v Detroit Free Press, Inc,* 68 Mich App 360, 367-368; 242 NW2d 775 (1976). However, plaintiffs did not allege a cause of action predicated on malicious prosecution, nor, importantly, did defendants, as opposed to the Attorney General, initiate or prosecute the landfill litigation against plaintiffs. The state is not a party here.

In conclusion, the trial court did not err in dismissing plaintiffs' gross negligence action, which was barred, as a matter of law, pursuant to the applicable statute of limitations.[5]

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[4] This is of course assuming no statute of limitations problem.

[5] Plaintiffs' also address issues concerning res judicata and whether defendants owed a duty to plaintiffs with regard to the testing of groundwater. The trial court rejected those arguments made by defendants as part of their initial motion for summary disposition, and defendants have not filed a cross-appeal on those issues, nor have they presented those issues in their appellate brief. Regardless, considering our decision today, it is unnecessary to reach matters concerning res judicata and duty.

(continued…)

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Kirsten Frank Kelly

(…continued)